In the

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners,*

vs.

THE WASHINGTON UNIVERSITY, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' REPLY BRIEF.

WILLIAM E. KEMP,
City Counselor,
ELMO B. HUNTER,
ROY CUNNINGHAM,
JERRY DUGGAN,
Assistant City Counselors,
Counsel for Petitioners.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

INDEX AND SUMMARY OF POINTS ARGUED.

PAGE

I. Respondent challenges, without citation of authorities, petitioners' contention that this Court should determine the existence of the constituent elements of a contract in the light of the State law 1

II. The question of *res judicata* is not before this Court for decision 5

III. Respondent's claimed legislative grant of an all-inclusive and perpetual tax exemption is not inviolable 7

IV. It is at least doubtful whether the amendatory charter of Washington University carried over and transferred any exemption from taxation 16

V. The amended charter of Washington University, enacted by the Legislature and accepted by the University in 1857, contains no express language exempting that charter from the provisions of Section 7 of the law of 1845, reserving the right of "alteration, suspension and repeal in the discretion of the Legislature" of any charter granted by it, and hence is subject to the constitutional provisions of 1865 and of 1875 and the taxing acts enacted by the Legislature pursuant thereto 17

Conclusion 20

Cases Cited.

Chesapeake and Ohio Rwy. Co. v. Miller, 114 U. S. 176 16
Chicago Theological Seminary v. Illinois, 188 U. S. 662, 674 13
Citizens Savings Bank of Owensboro v. Owensboro, 173 U. S. 636 19
Dewey v. Des Moines, 173 U. S. 193 6
Erie Railroad v. Tompkins 2, 20
Gary Realty Co. v. Swinney, 322 Mo. 450, l. c. 458 11

INDEX—Continued.

PAGE

Grayson v. Harris, 267 U. S. 352, 358 6
Irving Trust Co. et al. v. Day, 62 S. Ct. 398, 86 L. Ed. 349 19
Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633 6
Louisville v. Bank of Louisville, 174 U. S. 439 19
McGoldrick v. Compagnie Generale Transatlantique, 309 U. S. 430, 434 5
Morton v. Dardanelle Sp. School Dist., 121 F. (2d) 423, l. c. 424 4
New York ex rel. Cohn v. Graves, 300 U. S. 308, 317 6
Northern Central Railway Co. v. Maryland, 187 U. S. 258, l. c. 267 12
North Pacific Railroad v. Duluth, 208 U. S. 583, l. c. 596 8
Pagel v. McLean, 283 U. S. 266, 269 6
Pennsylvania Hospital v. Philadelphia, 245 U. S. 20 9
People's Banking Co. v. Sterling, 300 U. S. 175, l. c. 182 4
Railway Company v. Bristol, 151 U. S. 556, l. c. 576 8
Rowse case, 42 Mo. 308 2
Tidal Oil Co. v. Flanagan, 263 U. S. 444, l. c. 451 4
University v. People, 99 U. S. 309 13
Voeller v. Neilston Co., 311 U. S. 531, 535 6
Washington University v. Rouse 20-21
Whitney v. California, 274 U. S. 357, 362, 363 6
William Jewell College case, 234 Mo. 299 11

Statutes Cited.

Section 2, Article XIII, Missouri Constitution, 1820 12
Section 7, Act of 1842 17
Section 10, Article I, Federal Constitution 3

In the

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners,*

vs.

THE WASHINGTON UNIVERSITY, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' REPLY BRIEF.

ARGUMENT.

I.

Respondent challenges, without citation of authorities, petitioners' contention that this Court should determine the existence of the constituent elements of a contract in the light of the State law.

Under point I of our original brief, we asserted that the Missouri Supreme Court had erred in holding that, in determining whether the charter of the respondent con-

stituted a contract, the decision of this Court in the Rouse case was "commandingly decisive." It was and is our earnest contention that, since the decision in the case of *Erie Railroad* v. *Tompkins*, the existence of respondent's perpetual exemption from taxation and its validity as a contract should have been determined by the Missouri Supreme Court on the basis of the existence or non-existence of the essential elements of a contract as those elements are defined by the law of this State and not on the basis of the erroneous assumption that this Court's decision in the Rouse case was still controlling upon it.

In other words, the question presented was whether the Supreme Court of Missouri is still forced to follow this Court's decision under the Federal common law that a consideration may be presumed from the nature of the corporate charter, or whether the Missouri Supreme Court is free to decide on the basis of the law of the State that the charter tax exemption was not supported by a legal consideration and was at most a revocable grant, as was held by that court in its last independent opinion on the question in the Rowse case, in 42 Mo. 308.

In speaking of the ruling of the State court in the Rowse case, holding that the grant of respondent's charter was without consideration, respondent in its brief (p. 13) says:

> "This ruling constituted a marked and unjustifiable departure from the generally accepted principle that the charter of such a corporation as the respondent, accepted by the incorporators and acted on in good faith, is based on an adequate consideration and is therefore entitled to constitutional protection."

Respondent does not attempt to point out in what way or upon what principle this ruling of the State court "constituted a marked and unjustifiable departure from the

generally accepted principle," but blandly says that "petitioners' argument, if accepted, would leave this court powerless to correct the errors of a State court in this or any other situation. We submit that such is not, and cannot be, the law." No reason or authority is cited by respondent to support its assertion.

We said in our original brief (p. 10) that, since the Erie Railroad decision has repudiated the doctrine of a Federal common law, this court, in determining what constitutes the element of consideration, should apply the law as declared by the State court in the Rowse case.

Elaborating upon the argument in our original brief, we suggest the following illustrations as to the confusion incident to two distinct common law rules—State and Federal:

"A" undertakes to make a contract with "B" and the State court in determining, without regard to any subsequent legislation, the existence of a contract, finds that the transaction is not supported by a valid consideration and because of this lack of consideration "A" cannot recover. In a second case an attempted contract is entered into and thereafter a statute is passed, which, if there be a contract, the statute would impair it. The State court, applying the same rule as to the facts essential to make up consideration in the first illustration, holds that there is no contract and hence the constitutional provision against impairment may not be invoked. The Supreme Court of the United States, ignoring the rule of the State court as to what constitutes consideration, holds in the second case that there is a contract and that this legislation impairs it. Thus we have the confusion incident to two rules of common law, State and Federal.

This Court has uniformly held that the provision of Section 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is

directed only against impairment by subsequently enacted legislation, and not by any change in judicial decisions. *Morton* v. *Dardanelle Sp. School Dist.*, 121 F. (2d) 423, l. c. 424; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, l. c. 451 (opinion by Taft, C. J.), and in the case of *People's Banking Co.* v. *Sterling*, 300 U. S. 175, at l. c. 182, the Court said:

> "We cannot see in this an attempt to lay upon the stockholders by force of later legislation a new and different burden than that accepted at the outset. Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, *if the new meaning is not due to the compulsion of a statute*. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered."

The effect of these cases is to say that where a State court, in deciding that no contract existed, or that no impairment had taken place, did not give effect to a statute passed subsequently to the making of the contract, then the constitutional provision against the impairment of the contract may not be invoked. In such a case, the United States Supreme Court will not disturb the decision of the State court as to the nonexistence of a contract. But where legislation enacted subsequent to the alleged contract is involved, this Court may, in the absence of the rule in the Erie case, disregard the State court's determination as to what constitutes any essential element of a contract, thus contributing to the confusion which the Erie decision sought to relieve.

II.

The question of *res judicata* is not before this Court for decision.

Even though the Supreme Court of Missouri expressly refused to pass upon the question of *res judicata* because it was not before the Court, respondent makes the contention that this Court should affirm the judgment on that ground (respondent's brief, pp. 17-20).

In holding that it could not pass upon the question of *res judicata* because it was before it, the Missouri Supreme Court in its opinion (153 S. W. [2d] 35, 39) said:

> "The university pleaded and proved two grounds for relief. First, its charter exemption, and second, the doctrine of *res judicata*. The decree of the trial court in favor of the university was based exclusively on the ground that the charter of the university exempted it from texation. There is no mention, naturally, of *res judicata* in appellants' motion for new trial, nor did the university appeal from the decree because of the court's failure to rule on this contention. While we find the university's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park* v. *Kansas City*, 174 Mo. 425, 74 S. W. 979, and *North St. Louis Gymnastic Society* v. *James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42, we can not pass upon it because it is not before us."

Manifestly, this Court will not give consideration to respondent's insistence that the judgment of the State court be affirmed on a ground that was not before that Court for decision. It is the settled practice of this Court, in certiorari cases from State courts, to consider only questions which were presented or decided in the State court. This Court, in its recent decision in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430,

434*, declined respondent's suggestion that it consider an additional ground in support of the judgment. That case was before this Court upon certiorari to review the judgment of the Court of Appeals of New York, which had affirmed the judgment of the lower court, holding that the New York City tax upon sales of fuel oil was unconstitutional. The affirmance was on the single ground that the tax violated the "commerce clause," and the respondent in this Court on certiorari unsuccessfully attempted to have this Court consider as an additional reason in support of the judgment of the State court that the tax was unconstitutional by reason of being a prohibited impost or duty on imports and exports.

The Missouri Supreme Court, not only in its opinion in the case at bar, but also in the Baumann case, 341 Mo. 708, 726, held that the question of *res judicata* was not brought before it for its decision. The State court having

---

*Mr. Justice Stone delivering the opinion of this Court, in refusing to consider such additional ground, said:

"In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *New York ex rel. Cobn* v. *Graves*, 300 U. S. 308, 317.

"Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

To the same effect see—*Voeller* v. *Neilston Co.*, 311 U. S. 531, 535.

Grayson v. *Harris*, 267 U. S. 352, 358.

Pagel v. *McLean*, 283 U. S. 266, 269.

twice passed upon a question involving its own practice, and twice held that *res judicata* was not before it upon the record, this Court, under its well established practice, must refuse respondent's suggestion that the question of *res judicata* is in the case here.

III.

Respondent's claimed legislative grant of an all-inclusive and perpetual tax exemption is not inviolable.

Under point 3 of respondent's brief (p. 21 *et seq.*), respondent urges that its claimed perpetual and all-inclusive tax exemption should be declared inviolable and advances three considerations to support the validity of the tax exemption clause in its charter:

(1) There was no constitutional restraint against the granting of the exemption;

(2) The exemption clause is unambiguous and embraces the types of property involved;

(3) There is no showing of abuse of legislative power in the original grant or of the existence of any present emergency which might justify relaxation of a constitutional guaranty.

As to the first of respondent's stated considerations, if it is true, as petitioner contends, that the sovereign power of taxation can never be perpetually alienated by a transient legislature, then it is immaterial whether or not at the time of the attempted grant there was any express constitutional restraint against the granting of the exemption. Further, if, as contended in our original brief (p. 19 *et seq.*), the grant was subject to the reserved sovereign power of the state to tax, then such conditional grant was revoked by the people of the State of Missouri in the adoption of their Constitutions of 1865 and 1875,

and their legislative enactments pursuant thereto as referred to later herein.

In further support of our contention that it was beyond the power of the legislature to grant perpetual exemption from taxation, we call attention to the following additional decisions:

In *North Pacific Railroad* v. *Duluth*, 208 U. S. 583, l. c. 596, this Court sustained an ordinance of the City of Duluth requiring a railway company to repair, at its expense, a viaduct over numerous tracks at a street intersection, which ordinance was in conflict with the provisions of an earlier contract providing for the cost of construction of said viaduct. In passing on this question, the Court said, l. c. 596:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

And in support of this position, the Court quoted from its earlier decision in *Railway Company* v. *Bristol*, 151 U. S. 556, l. c. 576, to the following effect:

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

Summarizing its views in the North Pacific Railway case, the Court held that:

> "the result of these cases is to establish the doctrine of this Court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

In *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20 (opinion by Chief Justice White), the Court had under consideration an attempt by the City of Philadelphia to exercise the right of eminent domain by opening a street to the hospital property in the face of a state statute specifically forbidding the opening of any street or alley through the grounds in question without the consent of the hospital authorities. It was there held, l. c. 23:

> "There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties."

As to respondent's second consideration that the exemption clause is unambiguous and embraces the types of property involved in the instant suit, respondent asserts that the scope of the exemption is no longer open for consideration. In neither of the two decisions which respondent cites as authority for the proposition that its

charter exempts *all* of its property from taxation, was the point presented to or considered by the Court concerning the application of the tax exemption clause to property acquired after the adoption of the Constitutions of 1865 and 1875. In considering the types of property exempt, the Courts in those cases had under consideration only the question of the exempting clause being limited to property actually occupied and directly used for university purposes. No consideration was given to or determination made concerning the question of exemption of after-acquired property. The instant suit involves the right of the City of Kansas City to levy and collect taxes on three tracts of real estate within Kansas City, purchased by the University between 1892 and 1937, and held for investment purposes (R. 116-117).

Respondent's brief makes no attempt to answer the contention made in our original brief (p. 26), that the property involved in this suit is subject to taxation by Kansas City by virtue of the Missouri Constitutions of 1865 and 1875 and the legislative tax acts passed pursuant thereto, which were adopted and enacted long prior to the time of the acquisition by respondent of the property involved in the instant case. No rights in the property involved herein had vested in the respondent prior to the adoption of said new Constitutions, both of which expressly prohibited special tax exemptions. Particularly did the framers of the Constitution of 1875 determine that the exemption from taxation of the property of educational institutions should be limited to the extent of one acre and the buildings thereon when used exclusively for school purposes. This determination resulted from the acquisition by private educational institutions, allegedly protected by character tax exemptions, of vast amounts of income producing real estate. While the question of

subsequently acquired property was not squarely before the Missouri Supreme Court in the case of William Jewell College, 234 Mo. 299, cited by respondent, the language of Justice Brown, in his concurring opinion, which separate opinion was concurred in by Justice Woodson, is significant. At page 323, Justice Brown says:

> "If this suit involved an attempt to collect taxes from real estate acquired by defendant after the adoption of the Constitution of 1875, a very different question would be presented, but one upon which it is not now necessary to express an opinion."

Since respondent in its brief (p. 26) quotes from the opinion of Judge Graves in the William Jewell College case, referring to it as "a significant utterance of the very court whose judgment is hereunder attacked," we feel it appropriate to call attention to the fact that the opinion of the Justice from which the quotation is taken was concurred in unqualifiedly by only one other judge of the Missouri court, two judges concurring in result only by separate opinions, and three of the seven judges dissenting. Therefore, the language quoted by respondent can, under such circumstances, scarcely be said to represent the "utterance of the very court whose judgment is hereunder attacked." It has uniformly been held in this State that, under such circumstances, the views expressed are merely the views of the judge who wrote the opinion and the judges who specifically concurred therein, where less than a majority of the judges so concur, and hence the quoted language from the Graves opinion cannot be said to be "the utterance of the court." *Gary Realty Co.* v. *Swinney*, 322 Mo. 450, l. c. 458.

Under the third consideration advanced in support of the validity of the tax exemption, respondent recognizes

that "the power of a legislature to bind succeeding legislatures * * * is not without limit" and that there may be situations that would justify "a relaxation of constitutional guarantees" (respondent's brief, p. 26), but denies that the case at bar presents any features justifying an application of these conceded principles. It is petitioner's contention that the factual situation recited by Justice Wagner in the Rowse case presents an adequate justification for the public policy as to taxation as solemnly declared by the people in the adoption of the Constitution of 1865 and again in the adoption of the Constitution of 1875. In adopting those constitutional provisions, the people of the State exercised the right which they had expressly reserved to themselves in the Constitution of 1820 which, in Section 2 of Article XIII thereof, provided that the people of this State have the "inherent, sole and exclusive right of regulating the internal government and police power thereof and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness." The exercise of a right which was a condition of the so-called contract cannot be said to be an impairment of that contract. *Northern Central Railway Co.* v. *Maryland*, 187 U. S. 258, l. c. 267. Petitioners further urge that, based upon the law of Missouri as to the facts necessary to constitute a legal consideration—which we submit is a sounder view than that announced by this Court in the Rouse case—no question of any "relaxation of constitutional guaranties" are here involved.

The authorities relied upon by respondent to support its contention on this point were all decided during the period of the erroneous assumption of the existence of a Federal common law. One of the two cases which respondent cites as outstanding cases upholding validity of tax

exemption clauses in charters of charitable and educational institutions, is the case of *University* v. *People*, 99 U. S. 309, involving Northwestern University (respondent's brief, p. 24). The doctrine of this case was greatly relaxed in the later case of *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 674. This decision is indicative of the later tendency to give great deference to the State court's interpretation of the language of a charter involving tax exemption.

Respondent advances the argument that the tax exemption was in the nature of an annual appropriation of public funds in aid of the enterprise and constituted a contribution by the State to respondent.

It is true that the State was then, and is now, vitally interested in the promotion of education, but the suggested method of state support of education is in conflict with the public policy solemnly declared by the people by the Constitutions of 1865 and 1875. The State supports public education out of funds of the state treasury, raised by state-wide general taxation. The suggested appropriation of public funds as a contribution by means of exempting its property from taxation results in unequal distribution of the burden of supporting respondent University and discriminates against the local communities in which it may hold vast tax exempt income properties. And thus, Kansas City and St. Louis, where respondent's real estate investments are concentrated, are unequally burdened with the support of respondent University, and, on the theory of State support through tax exemption, are unjustly discriminated against. Should the University choose to concentrate its investment in the real estate of *any* particular city of the State, sufficient property might well be removed from the tax rolls as to imperil the necessary revenues for the proper maintenance of essential services in such city.

Respondent reiterates with much eloquence that tax exemption itself is an act of sovereignty, but cites no authority in support thereof. Such argument is not convincing since if the granting of the tax exemption be the exercise of a power of sovereignty, then, likewise, a contract to relinquish the right of eminent domain or of the police power would be an act of sovereignty rather than the relinquishment of sovereignty. It is well settled, and respondent concedes, that the sovereign cannot alienate from itself the police powers or right of eminent domain. If the bargaining away of the police power and eminent domain are acts of sovereignty, then, on respondent's theory, why should not such exercise of sovereignty be held valid?

When the special Act of 1853 incorporating the Eliot Seminary was amended by the special Act of 1857, not only was the name of the corporation changed to "The Washington University," but, as pointed out in respondent's brief (p. 25), the original act was amended to change the powers of the corporation in many other respects. Section 2 of the Amendatory Act prohibited instruction "either sectarian in religion or party in politics." Section 5 undertook to relinquish the sovereign right to eminent domain by providing:

> "And it shall not be lawful for the City of St. Louis or the County of St. Louis to open any road, street, alley or avenue through or over said tract or any part thereof so long as it shall remain the property of said corporation, without the consent of the Board of Directors of said university, expressed by resolution formally entered upon the minutes of their proceedings." (R. 109.)

Would respondent urge that its attempted charter exemption from the exercise of the right of eminent do-

main was a valid and enforceable contract? Is not the sovereign power of taxation more vital and necessary to the functioning of an ordered society than that of the exercise of eminent domain? If the latter cannot be bargained away, on what principle or distinction can the former be the subject of a perpetual grant? Sovereign powers should not include the right of self-destruction by granting perpetual tax exemption to an unlimited amount of property.

Respondent says (p. 27) that the real question is not whether the State can bargain away its sovereign power, but whether the particular bargain satisfies our concepts of an enforceable contract. We assert that the first proposition is involved in the determination of the second. Our concepts of an enforceable contract impel us to conclude that respondent's claimed tax exemption is not such a contract, first, because as determined by the Missouri court in the Rowse case, the element of consideration is lacking, and second, because the State cannot contract away forever the most fundamental of the attributes of sovereignty. The question may be considered, as asserted by respondent, whether the particular bargain—the University's charter exemption—satisfies the concepts of this Court concerning a contract which shall stand as long as ordered society shall exist under our present form of government. In other words, is not the Federal Constitution, including the contract clause thereof, a live and virile law which may be subject to growth and change in the Court's concept of its purpose and function in an ordered but changing society? Rather, will not this Court, in satisfying its concept of a perpetual tax exemption as a contract on the one hand, and its concept of the right of future citizens of Missouri yet unborn to have a free exercise of the powers of sovereignty, give its sanction to the latter?

IV.

It is at least doubtful whether the amendatory charter of Washington University carried over and transferred any exemption from taxation.

The amendatory charter of the Washington University provided:

> "The Washington University * * * shall have, hold and enjoy all the property rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary."

This language is not broad enough to confer exemption from taxation.

In the case of *Chesapeake and Ohio Rwy. Co.* v. *Miller*, 114 U. S. 176, a charter by the State to the Covington Railroad Co. provided that:

> "No taxation upon the property of said company shall be imposed by the state until the profits of said company shall amount to 10% of the capital."

A successor corporation to the original grantee, which acquired its property under a foreclosure sale by virtue of a statute governing foreclosures, succeeded to, among other things, "all such franchises, rights and privileges as would have been had by the first company but for such (foreclosure) sale."

It was contended by the successor railway company that it inherited exemption from taxation by virtue of the charter originally granted to its predecessor and the language of the statute immediately above quoted. The Supreme Court held that said language, broad as it was, was not sufficient to give it this force and meaning; that there was no express reference to a grant of any exemp-

ion or immunity; that nothing was said in relation to the subject of taxation; that the words actually used do not necessarily embrace a grant of such exemption from taxation, l. c. 185.

The only difference between the language in the amendatory charter of the Washington University and the language above quoted is that the amendatory charter uses the word "immunity," while the statute above referred to does not. However, the statute uses words that would seem to include immunities, to-wit: "franchises, rights and privileges."

It should be noted that the Court said that nothing was stated in the statute in relation to exemption from taxation, and that, therefore, they did not necessarily embrace such an exemption. The same may be said of the language in the amendatory charter of the Washington University.

V.

The amended charter of Washington University, enacted by the Legislature and accepted by the University in 1857, contains no express language exempting that charter from the provisions of Section 7 of the Law of 1845, reserving the right of "alteration, suspension and repeal in the discretion of the Legislature" of any charter granted by it, and hence is subject to the constitutional provisions of 1865 and of 1875 and the taxing acts enacted by the Legislature pursuant thereto.

This position is asserted under point C of II, at page 24 of the original briet. Although respondent, in its brief, has failed to make any answer to this contention, we wish to somewhat amplify what we there said.

The right reserved by Section 7 of the Act of 1845, to the effect that "The charter of every corporation granted by the Legislature shall be subject to alteration, sus-

pension and repeal," was applicable to the amended charter. The original charter undertook to do two (2) things: (1) to exempt the property of the corporation from taxation, and (2) to make that exemption irrevocable by expressly exempting it from the provisions of Section 7 quoted above.

Even if the amendatory act carried over and transferred to Washington University "all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary," nowhere is there any express intention in the amendatory act to continue or carry over the exemption from the provisions of Section 7 above. Applying the rule of strict construction indulged in all cases involving immunities from taxation, we submit that the provision against the application of the law reserving the right to amend charters cannot be read into the amended charter, and hence this amended charter, which is the charter under which Washington University today holds its property, was accepted subject to the reserved power of the State to alter and amend any special charter enacted by the Legislature.

The Baumann case, while ruling on the question of the transfer of the immunities and privileges conferred on the Eliot Seminary as including the tax exemption, did not discuss or pass upon the question of the amended charter being subject to Section 7 or the right of alteration, amendment and repeal as reserved in Section 7, the Court there holding that regardless of whether it be considered a transfer of corporation privileges or whether the rights to exemption from taxation be considered a franchise, "it was at least an immunity, the continued enjoyment of which was vouchsafed by the act." Even if this be conceded, *arguendo*, and that such tax immunity

was transferred, the corporation was entitled to enjoy the same only until the State so exercised its reserved right to alter and amend the charter under Section 7.

In the Kentucky Bank tax cases, this Court applied the rule that if there is nothing in the amending or extending act expressing the plain intent of the Legislature that the charter, as amended or extended, should not be subject to the reserved power of the Legislature to amend or repeal, then the extended or amended charter is subject to amendment or repeal. *Louisville* v. *Bank of Louisville*, 174 U. S. 439, and *Citizens Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

Irving Trust Co. et al. v. *Day*, 62 S. Ct. 398, 86 L. Ed. 349, recently decided by this Court, and cited in respondent's brief (p. 12), gives application to this rule. In delivering this recent opinion of this Court, Mr. Justice Jackson said, l. c. 401-402:

> "McGlone was free to consent to a cancellation or revocation of Helena's waiver, or to make a valid bequest to her of all or any of his property despite it. Further, he could free her of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. This is what he did by executing the codicil of July 6, 1934, voluntarily taking advantage of the privilege of further testamentary disposition offered by the laws of New York. So long as McGlone stood on the will made before the effective date of the legislation, the law allowed him to avail himself of the full force and effect of the waiver. Given his choice between adhering to any will made before September 1, 1930, or of bringing his estate under the new law, McGlone saw fit to execute a further testamentary document after that date and thus to bring the new legislation into operation as to himself, his estate and survivors. For the purpose of considering the application of the contract and due process clauses of the Federal

Constitution, the case is as if he had made a volu
tary legacy to his wife despite her waiver. If th
obligation of the waiver suffered impairment, it wa
only because he exercised further testamentary priv
ileges with a condition attached, and thereby brough
those consequences unwittingly or intentionally upo
himself and his estate."

Merely to indicate the current trend of judicial thinking, we call this Court's attention to the decision of the Minnesota Supreme Court in the case o Trustees of Pillsbury Academy v. State, 204 Minn. 5 283 N.W. 727, l.c. 732, wherein the Court said:

"The time may be ripe to re-open and re-consi the question whether a state's power of taxation any more than that of police or eminent domain, may be bartered away, substantially limited, or impaired by act of its own legislature. It is settled that the police power and that of eminen domain may not be so trammeled for all time. Wi important limitations, the rule is established that the power of taxation, just as much and as vitally an attribute of sovereignty, may be subject to contract limitation. That view has alwa met with strong and persuasive resistance. Alwa it has been questioned by eminent authority, and upon reason not easily demolished. We do not dis cuss the problem further because it has not been argued. We do not consider it forever closed. See note, 'Corporate taxation in the United Stat as affected by the contract clause in the Federa Constitution', 60 L.R.A. 33."

In this connection, we wish to call particular a tention to said note in 60 L.R.A. at pp. 60-64 whic contains a summary of the decisions in the Ohio Ban cases involving legislative power to surrender beyo recall any part of the sovereign power of taxation, and pp. 69-74 of said note summarizing the decision on the reserved right to alter, amend and repeal,

the Missouri Supreme Court in its decision in the instant case felt bound to and did follow the majority opinion of this Court in *Washington University* v. *Rouse*, which majority opinion is unsound and should be overruled.

Respectfully submitted,

WILLIAM E. KEMP,
City Counselor,
ELMO B. HUNTER,
ROY CUNNINGHAM,
JERRY DUGGAN,
Assistant City Counselors.
Counsel for Petitioners.